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Supreme Court of the United States

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SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICI CURIAE* OF THE STOCKBRIDGE-MUNSEE INDIAN COMMUNITY, THE ONEIDA INDIAN NATION OF WISCONSIN, THE TONAWANDA BAND OF SENECAS, AND THE TUNICA-BILOXI TRIBE IN SUPPORT OF PETITIONER

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Interests of Amici Curiae

The Eleventh Circuit's decision in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994) is based on an incorrect interpretation of the relationship between the Indian Commerce Clause and the Eleventh Amendment. Amici support the Seminole Tribe in challenging the *Seminole* decision.[1]

The Stockbridge-Munsee Community is a federally-recognized Indian tribe. The Community was originally located in north central New York. Its land was acquired by the State in a number of transactions that were never approved by the federal government. The Tribe has filed a claim to those lands under the Indian Commerce Clause and Indian Nonintercourse Act, 25 U.S.C. §177. *Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140 (N.D.N.Y.). The defendants include the State, state officials, counties, and municipalities. The State and state officials have moved to dismiss the Community's claims based on the Eleventh Amendment.

The Oneida Indian Nation of Wisconsin is a federally recognized Indian tribe, with its principal situs at Green Bay Wisconsin. It is one of the three political successors in interest to the aboriginal Oneida Nation, located at the time of white contact in upstate New York. The Oneida Tribe of Wisconsin is also one of three plaintiffs in lawsuits pending in upstate New York known as the Oneida land claim cases. In these suits, the modern day successors to the Oneida

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[1] Pursuant to Rule 37.3, written consents from counsel of record for the parties have been filed with the Clerk of the Court.

Nation assert federal law based claims to the territory known as the Oneida Reservation. *Oneida Indian Nation of New York v. County of Oneida*, 70-CV-35 (N.D.N.Y.); *Oneida Indian Nation of New York v. County of Oneida*, 74-CV-187 (N.D.N.Y.). The first of these cases has been before this Court on two occasions. *Oneida Indian Nation v. County of Oneida*, 470 U.S. 226 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). Since the Court's 1985 decision, the State of New York has expressed its willingness to negotiate a settlement of the claims and has sporadically engaged in such negotiations. However, the State of New York has to date offered no land, money, or other resources toward a settlement of the Oneida land claim cases.

The Tonawanda Band of Seneca Indians is a federally recognized Indian nation in New York State. It is a party in a pending action concerning a Seneca claim under the Nonintercourse Act. *The Seneca Nation of Indians v. New York*, No. 93-CV-688A (W.D.N.Y.). A decision in the present case upholding State immunity under the Eleventh Amendment would adversely affect the rights and claims of the Senecas.

The Tunica-Biloxi Tribe is a federally recognized Indian Tribe which has a Reservation in Avoyelles Parish, Louisiana. The Tribe lodged a Litigation Request with the Interior Solicitor in August, 1980 regarding some 17,000 acres of land in the State of Louisiana which it claims under the Indian Nonintercourse Act. To date, the federal government has taken no action on this Litigation Request.

Further research and investigation have resulted in an increase to a total of 64,000 acres which can be claimed under the Nonintercourse Act. In addition, the Tribe is operating Class III gaming under the Indian Gaming Regulatory Act. The decision in *Seminole* poses serious questions as to (1) the Tribe's land claims, and (2) the enforceability of the Tribal-State compact for Class III gaming. Since the Indian Commerce Clause is the basis for both the Nonintercourse Act and the Indian Gaming Regulatory Act, this Court should affirm the principle that the Indian Commerce Clause abrogates the Eleventh Amendment immunity of the States.

The Stockbridge-Munsee Community, the Oneida Nation of Wisconsin, the Tonawanda Band of Seneca Indians, and the Tunica-Biloxi Tribe have a significant interest in advancing the proper interpretation of the Indian Commerce Clause and the Eleventh Amendment. If the *Seminole* decision stands, the Tribes' land claims could be subject to dismissal even though the clear purpose of the Indian Commerce Clause was to confer authority in Indian affairs on the federal government to the exclusion of the states.

Summary of Argument

The Indian Commerce Clause gives Congress the authority to abrogate the Eleventh Amendment immunity of states. Congress has validly done so in the Nonintercourse Act and other Indian statutes. Alternatively, the federal courts can enjoin violations of federal Indian statutes, such

as the Nonintercourse Act, enacted under Congress' Indian Commerce Clause authority.

Argument

I. Introduction

The Indian Commerce Clause, Art. 1, § 8, cl 3, states that "Congress shall have the power . . . to regulate commerce . . . with the Indian tribes". Congress has passed a number of Indian statutes, under the Indian Commerce Clause, regulating a broad range of activities in Indian Country. The earliest and most fundamental of such legislation is the Nonintercourse Act[2] which has been consistently construed by courts to regulate states as well as private individuals in their dealings with Indian lands. *County of Oneida*, 470 U.S. 226; *Oneida Indian Nation*, 414 U.S. 661; *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980) *cert. den.* 452 U.S. 968 (1981). The Nonintercourse Act provides,

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or

[2] The Nonintercourse Act was initially passed in 1790, ch. 33, 1 Stat. 137. Congress passed a stronger, more detailed version in 1793. Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; *see also* the Act of May 19, 1796, ch. 30, 1 Stat. 469; the Act of Mar. 3 1799, ch. 46, 1 Stat. 743; the Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; the Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 729. The Nonintercourse Act is now codified at 25 U.S.C. §177 (1983).

> equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . .

Amici have Nonintercourse Act claims against the State of New York which raise, or could raise, Eleventh Amendment issues. The Eleventh Circuit incorrectly interpreted the relationship between the Indian Commerce Clause and the Eleventh Amendment in *Seminole*.

II. In the Indian Commerce Clause, the States Surrendered to Congress all Sovereign Power to Manage Relations With Indian Tribes, Including States' Sovereign Immunity to Suit in Cases Arising Under Federal Indian Legislation

In perhaps the clearest explication of the law of state sovereign immunity, Justice Stevens observed in *Pennsylvania v. Union Gas*, 491 U.S. 1, 23 (1989) (Stevens, J. concurring) as follows:

> It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985). In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases

like *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890).

The former is not implicated in this case, inasmuch as the issue before the Court arises under federal question jurisdiction, not diversity jurisdiction.[3] With respect to the latter, that is, the judicially created doctrine of state immunity from suits arising under federal legislation, state sovereign immunity is viewed by the Court as necessary to maintain the "constitutionally mandated balance of power between the States and Federal Government." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).[4]

Under the Indian Commerce Clause of the Constitution, states are effectively ousted from the field in favor of exclusive and plenary congressional authority. The Delegates to the Federal Convention understood the necessity

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[3] The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[4] The *Atascadero* Court did not adopt Justice Stevens' two prong analysis of state sovereign immunity, i.e., as a jurisdictional bar in diversity cases only and otherwise as a limitation arising from prudential concerns of federalism. However, the *Atascadero* Court did view a broadly read Eleventh Amendment as necessary to preserve the sovereign balance struck between states and the Federal Government in the Constitution. *Id.* at 238 n.2. Even this broad reading of the Eleventh Amendment allows a finding that Congress can abrogate state sovereign immunity in the exercise of its Indian Commerce Clause authority inasmuch as the Founders contemplated no role for state sovereignty in the field of Indian affairs. *See* discussion below.

for undivided authority in Indian affairs in the central government because of the unquestionable failure of divided authority over the subject between the states and federal government under the Articles of Confederation. As a result, the states reserved no sovereign authority over Indian affairs under the Constitution and no corresponding sovereign immunity from suit, in the face of a congressional abrogation thereof.[5]

A. The Delegates to the Federal Convention Intended and Accomplished a Delegation to Congress of the Whole and Complete Authority to Manage Relations with Indian Tribes

When the Delegates came together at the Federal Convention, consensus existed among them on fundamental and debilitating defects of the Articles of Confederation. Among these was the inability of the general government to adopt and implement an effective Indian policy. The Delegates set about devising a form of federal government

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[5] In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Court rejected the proposition that states had been stripped of their sovereign immunity to suit by Indian tribes "in the plan of the convention." *Id.* at 782. Amici do not revisit that proposition here. Amici do not argue for a self-executing and complete abrogation of state sovereign immunity under the Indian Commerce Clause, similar to that proposed in *Blatchford*. Rather, Amici argue that Congress holds the authority under the Indian Commerce Clause to abrogate state authority in federal legislation where necessary to maintain the constitutionally mandated pre-eminence of congressional and tribal authority in Indian country.

with these specific concerns in mind, so as to render the new federal government "adequate to the exigencies and government, and the preservation of the Union." *See* M. Farrand, The Framing of the United States Constitution, ch. III (1913).

The difficulties with federal Indian policy existed in large part because of the ambiguous language of the Indian clause of the Articles of Confederation. In Article IX, Congress' enumerated powers included that of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." IX Journals of the Continental Congress 919, November 15, 1777. There is no doubt that the main body of the Articles' Indian clause delegated power to Congress over the subject, but considerable doubt existed regarding the extent of state authority preserved by the "shackles" in the limiting provisos. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 554 (1832).

In Madison's view, the "obscure and contradictory" language of the limiting provisos rendered the effective management of Indian affairs an impossibility: no management of trade could be undertaken by the federal government that did not infringe upon the legislative right of states. The Federalist, No.42; P. Prucha, American Indian Policy in the Formative Years 28-30 (1970). The Continental Congress' experience in administering Indian affairs bore out Madison's criticism of the divided authority over the subject in the Articles' Indian clause.

Immediately after the conclusion of the Revolutionary War, the Congress took steps to establish peace with Indian nations who had fought on both sides of the conflict. In accordance with instructions from Congress, federal treaty commissioners in the northern district made arrangements to treat with the Six Nations for peace. *See* XXV Journals of the Continental Congress 687. New York State objected to federal efforts to treat with Indian nations in its borders and attempted to conclude peace with the Six Nations itself. Hough Report on Proceedings of the Commission 9-10 (1861). New York State's effort failed, however, and the federal treaty commissioners felt obliged to advise the Six Nations that "a treaty with an individual State, without the sanction of Congress, could be of no validity." N. Craig, II Olden Times, 6 (Pittsburgh 1848).

Acting under very similar instructions from Congress in 1786, federal treaty commissioners in the southern district concluded a number of treaties with the Cherokee, Choctaw and Chickasaw Nations, all of whom were located within the borders of North Carolina and Georgia. *See* Treaties of Hopewell, November 28, 1785, January 3, 1786, and January 10, 1986, 7 Stat. 18, 21, and 24. Both states openly challenged Congress' authority to demarcate tribal lands and prohibit intrusions thereon as the Treaties of Hopewell had done. Both states encouraged their citizens to settle upon Indian lands and, in some cases, purported to purchase tribal land from individual Indians. *See generally*, Prucha at 32-40. By the time of the Federal Convention, the intrusions were so aggressive "as to amount to an actual although informal war of the said white inhabitants against the said Cherokees." Report of Secretary

of War Henry Knox to the Continental Congress, XXXIV Journals of the Continental Congress 342, July 1788.

The Continental Congress assured the signatory Indian tribes of the inviolability of the federal treaties, investigated the st te intrusions onto tribal lands, and continuously asserted its authority to manage relations with Indian tribes under Article IX. In the end, though, the Continental Congress acknowledged the limitations it faced in effectively administering Indian affairs arising from the authority reserved by the states in the Indian clause:

> [B]ut there is another circumstance far more embarrassing, and that is the clause in the confederation relative to managing all affairs with the Indians, &c. is differently construed by Congress and the two States within whose limits the said tribes and disputed lands are. The construction contended for by those States, if right, appears to the committee, to leave the federal powers, in this case, a mere nullity; and to make it totally uncertain on what principle Congress is to interfere between them and the said tribes; the States not only contend for this construction, but have actually pursued measures in conformity to it.

XXXIII Journals of the Continental Congress 457, August 3, 1787. The lesson of this experience was not lost on the Delegates to the Federal Convention.

The few references to Indian affairs made by Delegates at the Convention were variations on the same theme: that states' claim to authority and interference in the conduct of Indian affairs was a defect in the Articles that must be avoided in the new constitution. For example, during debate on the New Jersey Plan, which would have established a far weaker federal government than the Virginia Plan previously debated, Madison queried:

> Will it prevent encroachments on federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic ancient and modern. By the federal articles, transactions with the Indians appertain to Congs. Yet in severl instances, the States have entered into treaties and wars with them.

Farrand, I Records of the Federal Convention of 1787 315; *see also* Farrand, III Records of the Federal Convention of 1787 548 (Madison's comment) ("In certain cases, the authy of the Confederacy was disregarded, as in violations not only of the Treaty of peace; but of Treaties with France & Holland, which were complained of to Cong. In other cases, the Fedl authy was violated by Treaties & wars with Indians, as by Geo."); *and* II Papers of James Madison 246-47 (letter of Edmund Randolph observing that a state treaty with Indians would be "in defiance of the confederation.")

When the Convention considered enumerated powers for Congress, Charles Pinckney proposed that Congress be

given the power "to regulate affairs with the Indians, as well within as without the limits of the U.S." I Elliott's Debates on the Federl Convention 223 (1836). This and other enumerated powers were referred to the Committee of Eleven, which simplified the language to read "and with Indian tribes" following the general commerce clause. IV Elliott's Debates 283. The recommendation was adopted by the Convention without any substantive debate, thus stripping Congress' authority over Indian affairs of its shackles.

With respect to management of relations with Indian tribes, it was plainly the intent of the Delegates to delegate the power wholly and entirely to the Congress. Experience had taught the Delegates that division of authority over the subject between the states and federal government was unworkable. Consequently, the language that had reserved states' power over the subject was stripped from the new Indian Commerce Clause, delivering over to the Congress a power in which the states could not participate. *Worcester v. Georgia*, 31 U.S. at 559.[6]

B. This Court has Consistently Construed the Indian Commerce Clause as Ousting State Authority Over the Subject

Since *Worcester v. Georgia*, above, the Court has acknowledged the unique position of Indian tribes and

[6] In this respect, the scope of the Indian Commerce Clause exceeds that of the general Commerce Clause. *See* Prentice and Egan, The Commerce Clause of the Federal Constitution 342 (1898); *see also* 1 Op.A.G. 645 (1824).

Congress' authority over Indian affairs under the Constitution. There, the Court rejected Georgia's claim to authority over affairs of the Cherokee Nation, observing that, "The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States." *Id.* at 562. This result was based, in part, upon the basic principle of constitutional law that the Constitution delegated to Congress broad legislative authority over Indian affairs, one that excluded states. Cohen's Handbook of Federal Indian Law 260 (1982 ed.). The Court has since consistently interpreted the Indian Commerce Clause as delegating to the federal government an authority to manage relations with Indians in Indian country that excludes the states altogether. *See United States v. John*, 437 U.S. 634 (1978); *United States v. Mazurie*, 419 U.S. 544 (1975); *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Kagama*, 118 U.S. 375 (1886).

Indeed, in modern times, the Court has effectively presumed that state laws and regulations have no application to Indian tribes in Indian country, absent the express consent of Congress. Cohen's Handbook at 259-264. This presumption derives in part from the Indian Commerce Clause itself. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). It also derives from tribes' unique sovereign status, a status assumed by and enshrined into constitutional law by the Indian Commerce Clause.

> We long ago departed from the 'conceptual clarity of Mr. Chief Justice Marshall's view

> in *Worcester*' (citation omitted) and have acknowledged certain limitations on tribal sovereignty. Nevertheless, in demarcating the respective spheres of state and tribal authority over Indian reservations, we have continued to stress that Indian tribes are unique aggregations possessing 'attributes of sovereignty over both their members and their territory.' (Citation omitted.) Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a 'historic immunity from state and local control' (citation omitted) . . . our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringed on the right of reservation Indians to make their own laws and be governed by them.' (Citations omitted.)

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-332 (1983).

In the important area of taxation, the Court applies a *per se* constitutional rule that, absent the express consent of Congress, states have no authority to tax Indian tribes in Indian country. *California v. Cabazon Band of Indians*, 480 U.S. 202 n.17 (1987); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985). Outside the area of taxation, state regulation of Indian tribes in Indian Country has been upheld only in "exceptional circumstances" where the burden is a minimal one imposed for the purpose of enforcing state law as against non-Indians. *See e.g.*, *Confederated Tribes of the Colville*

Indian Reservation v. Washington, 447 U.S. 134 (1980) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), upholding state record-keeping requirements imposed on tribes to enforce payment by non-Indians of certain state taxes.

Even where a state tax or regulation applies to a non-Indian doing business with an Indian tribe in Indian country, the Court has engaged in a particularized inquiry into the nature of the state, federal and tribal interests at stake to determine whether the state law has been preempted by federal law. *Department of Taxation and Finance of New York v. Attea*, 512 U.S. __, 114 S.Ct. 2028 (1994). The preemption analysis undertaken by the Court in such cases does not depend upon an express statement to that effect in federal statutes, in contrast to the preemption rule applied in other fields. Hirsch, Toward A New View of Federal Preemption, 1972 U.Ill. L.Rev. 515. Instead, state authority can fail from implied as well as express federal preemption of state activity. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In the end, these special rules that apply only in the field of federal Indian law are premised upon Congress' and tribes' exclusive authority to govern affairs of Indian tribes in Indian country under the Indian Commerce Clause. Simply put, states have no sovereign powers respecting affairs with Indian tribes absent an act of Congress. As a consequence, Congress can abrogate states' immunity to suit in federal Indian legislation when, in the judgment of Congress, such is appropriate to preserve the constitutionally

mandated pre-eminence of federal and tribal authority in Indian Country.

C. In the Sphere of Indian Affairs, State Action Including Immunity to Suit Must be Governed by Applicable Federal Indian Legislation

In *Pennsylvania v. Union Gas Company*, 491 U.S. 1, the Court ruled that Congress could and did, in a particular exercise of its power over interstate commerce, abrogate the states' immunity from suit. Two lines of reasoning were given in support of this conclusion. Both lines support an interpretation of the Indian Commerce Clause as authorizing Congress to abrogate states' immunity from suit as well.

The plurality opinion in *Union Gas* relied upon the so-called waiver cases in its analysis of the immunity issue. *Citing Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), the Court characterized the Commerce Clause as a surrender of state sovereignty that carried with it a surrender of state sovereign immunity. *Union Gas*, above at 14. This view of the Commerce Clause was confirmed, according to the plurality, in *Employees v. Missouri Dep't of Pub. Health*, 411 U.S. 279 (1973). Although those cases found evidence to support a waiver of state immunity arising from the state's voluntary participation in a federally regulated activity, those cases' interpretation of the Commerce Clause led the plurality to conclude that Congress could simply abrogate state immunity. *Union Gas*, above at 20-22.

As established above, the reach of the Indian Commerce Clause is as great if not greater than the general Commerce Clause. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), where the Court observed: "Interstate Commerce and Indian Commerce clauses have very different application. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation (citations omitted), the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." The rationale supporting the plurality's conclusion in *Union Gas* is therefore even more compelling in the case of federal Indian legislation than in the case of legislation regulating interstate commerce.

In concurring in *Union Gas*, Justice Stevens analyzed the issue as "the proper role of the federal courts in the amalgam of federal-state relations." *Id.* at 25. Thus, the availability of state immunity depends upon the application of prudential rather than jurisdictional concerns. *Id* at 26. When in the exercise of its plain constitutional authority, Congress concludes that the preservation of federal rights or interests requires the abrogation of states' immunity to suit, Justice Stevens concluded that the principles of federalism and comity allow Congress to do so. *Id.* at 27-29.

In Amici's view, Justice Steven's analysis of the state immunity issue is the correct one for this case. As Justice Stevens demonstrates, it explains and is consistent with this Court's body of state sovereign immunity cases. *Id.* More importantly for present purposes, it reflects this Court's

traditional analysis of Indian law issues on principles of federalism that are unique to the field.

This Court has long held that Indian tribes, as "domestic dependent nations," are immune from suit absent a clear waiver by the tribe or congressional abrogation of tribal immunity. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 498 U.S. 505 (1991). Plainly, Congress can abrogate Indian tribes' immunity from suit and has done so in limited circumstances. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

To maintain the constitutionally mandated exclusion of state authority from Indian country, then, it follows that Congress must have comparable authority to abrogate states' immunity from suit under the Indian Commerce Clause. In *Blatchford*, the Court saw no blanket waiver of tribal sovereign immunity in the plan of the convention, there being no "mutuality" of concessions in the plan of the convention. *Id.* at 782. If the Indian Commerce Clause authorizes Congress to abrogate tribes' immunity to suit, then "mutuality" of concessions requires that the Indian Commerce Clause be construed to authorize Congress to abrogate states' immunity from suit.

Congress cannot be vested with full power to preserve exclusive federal and tribal authority in Indian country unless it has the authority to abrogate state immunity to suit, where appropriate. Congress' previous inability to regulate or prohibit states activity in Indian country led to the adoption of the Indian Commerce Clause, with its plain

language preserving the field for Congress alone. If Congress can and generally does exclude states from the field altogether, surely Congress can in its regulation of states in the field abrogate state sovereign immunity.

III. Federal Courts Can Compel State Officials to Comply With the Indian Commerce Clause

The Indian Commerce Clause provides a separate basis for relief in Indian land claims, and other, cases. State officials are not immune from suit when they violate the Constitution. In particular, if they withhold property obtained in violation of the Indian Commerce Clause, the federal courts can act to stop the violation.

One of the weaknesses in the Articles of Confederation was that they did not clearly delineate the division of authority between the states and the Confederal government in Indian affairs. "Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1, §8, cl 3, that granted Congress the power to regulate trade with the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 234 n.4. Of specific concern was the states' practice of treating with Tribes for land cessions. Clinton and Hotopp, Judicial Enforcement of the Federal Restraint on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me.L.Rev. 17, 36-37 (1979). The Indian Commerce Clause and the Nonintercourse Act changed that making Indian affairs the "exclusive province"

of the federal government and the "extinguishment of Indian title [dependent upon] the consent of the United States." *County of Oneida*, 470 U.S. at 234, 240.

The courts consistently acted to enforce those restrictions on alienation. *Id.* at 234-36; *see also Oneida Indian Nation v. County of Oneida*, 414 U.S. at 669-75. Although states were, in large part, the object of the Indian Commerce Clause and the Nonintercourse Act, it is only in recent times that Tribes have sued states and state officials for violations of those laws. *See e.g.*, *Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140, *above*; *Mohegan Tribe v. Connecticut*, Civ. No. H-77-434 MJB (D.Conn.); *Golden Hill Paugussett Tribe v. Weicker*, No. 2:92CV00738 (PCD) (D.Conn.).

Such suits are not barred by the Eleventh Amendment. Sovereign immunity does not protect state officers when they violate the Constitution and federal statutes. *Ex Parte Young*, 209 U.S. 123 (1908). Land acquisitions made in violation of the Indian Commerce Clause and the Nonintercourse Act were "void *ab initio*". *County of Oneida*, 470 U.S. at 245. The acts of state officials in holding land so acquired is an ongoing violation of the Indian Commerce Clause and the Nonintercourse Act. It is just such acts that federal courts can enjoin pursuant to the *Ex Parte Young* doctrine.

The doctrine of *Ex Parte Young* developed in order to give "life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The "theory" is that "an unconstitutional statute is void . . . and therefore does not

'impart to [the official] any immunity from responsibility to the supreme authority of the United States'". *Id.* (Citations omitted). The *Ex Parte Young* doctrine was foreshadowed by decisions involving real property. In *Tindal v. Wesley*, 167 U.S. 204, 221 (1896), this Court held that the "settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf." *Tindal* relied on the earlier decision in *United States v. Lee*, 106 U.S. 196 (1882).

The "rule of law" set out in *Tindal* and *Lee* was clarified in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688 (1982). Those cases made clear that the "Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Id.*, at 689.

The Indian land claim cases fit within the *Ex Parte Young* doctrine as prefigured by *Tindal* and *Lee* and interpreted in *Treasure Salvors*. Where state officers hold land acquired from tribes without federal consent, they are acting in violation of the Indian Commerce Clause and the Nonintercourse Act. The Eleventh Amendment does not protect them in that instance. *Treasure Salvors*, 458 U.S. at 689. Such an ongoing breach of federal law is "precisely the type of continuing violation for which a remedy may

permissibly be fashioned under Young." *Papasan v. Allain*, 478 U.S. 265, 282 (1986). Permitting relief against state officers in these circumstances protects the federal interests embodied in the Indian Commerce Clause and the Nonintercourse Act.

Conclusion

The Indian Commerce Clause gives Congress exclusive authority in Indian Affairs. Concomitantly, Congress and the federal courts have the authority to enforce that authority against the states.

Respectfully submitted,

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